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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

ALBERT THOMPSON,
Petitioner,

v.

KAWASAKI KISEN, K.K., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Albert Thompson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on July 7, 1965.

Opinion Below.

No opinion was rendered in the District Court. The opinion of the United States Court of Appeals for the First Circuit is printed in the appendix hereto (pp. 8-11) and also annexed to the record of the Court below (R. 57).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Did the Court of Appeals err in upholding the District Court in its ruling that plaintiff, a longshoreman, was required to testify as to his receipt of benefits ranging from $70 to $52 weekly during the period of his disability?

2. Did the Court of Appeals err in holding that a longshoreman's claim for injuries from a ship's accident is controlled by Massachusetts state law respecting the introduction of evidence as to the receipt of weekly benefits rather than federal law applicable to a maritime tort?

Statement.

At the time of his accident on September 3, 1961, the petitioner was fifty-four years old. He had engaged in longshore work steadily for thirty-two years. Despite the varied jobs of a longshoreman, ninety per cent of his work had been that of a holder. The work of a holder is heavy work requiring the lifting and moving of cargo.

While carrying a carton of nails, the plaintiff tripped and fell over a piece of dunnage. Prior to the accident plaintiff was in good health. Thereafter he was treated for his back injury at the Traveler's Clinic. At one time he was an inpatient at the Massachusetts General Hospital for about six weeks. From the onset of his disability to the trial on October 13, 1964, a period of over three years, the plaintiff was able to earn about $400. He was unable to resume work as a holder or do any heavy work in any other capacity. He was unable to procure work as a hatchtender. Prior to his injury plaintiff averaged a yearly income of $8,000 per year. The elements of damages sustained by the plaintiff consisted of (1) a loss of earnings alone of about $24,000; (2) agreed-to medical and hospital bills amounting to $1,445; (3) future loss of earnings be-

cause of plaintiff's permanent disability; and (4) pain and suffering endured and to be endured.

In the course of petitioner's cross-examination the following colloquy between the witness, counsel and the Court took place.

"Q. During this period you were receiving, from a source which for the moment I won't reveal, $70 a week, weren't you?

"MR. GREENBERG: I object to that, your Honor. That is strictly out of order and he knows it.

"THE COURT: Read the question.

(Question read)

"THE COURT: During what period?

"MR. HALLISEY: From the time of the accident—I guess I didn't define the period very closely, Judge, but it was from the time of the accident up until August of 1962, I think.

"THE COURT: It may be put.

"MR. GREENBERG: Your Honor, there's two Supreme Court decisions on that. That it is not admissible. Will you note my objection, please?

"THE COURT: Yes.

"MR. GREENBERG: I can give you the names of the cases if you want them. Within the last year.

"THE COURT: Put the question.

"MR. GREENBERG: Note my objection.

"MR. HALLISEY: Will you read it again, please?

(Question read)

"THE COURT: Yes or no.

"MR. GREENBERG: Do you have my objection?

"THE COURT: Yes.

"A. What year is that, please?

"Q. That was from the time of the accident up until August of 1962.

"A. Well, I received $70 a week for a period of time. I don't remember what period of time.

"Q. And then it was reduced to about $52 a week?

"MR. GREENBERG: Note my objection to this, too.

"THE COURT: I will. Go ahead.

"A. Yes, sir.

"Q. And that is continuing right until today, isn't it?

"A. No. I haven't been getting it recently." (R. 31, 32, 33.)

The jury returned a verdict in the sum of $7,827 on the negligence cause of action and found for the defendant on the unseaworthiness claim. The third-party defendant, Bay State Stevedoring Company, had previously filed a notice and claim of lien in the sum of $9,761.17, which constituted a total of compensation and medical benefits given to the plaintiff. The District Court entered a judgment and order that, by reason of the fact that the lien exceeded the jury verdict, the plaintiff was not entitled to any recovery of money whatsoever.

Reasons for Granting the Writ.

The decision of the Court of Appeals is in direct conflict with the decision of the Supreme Court in *Eichel* v. *New York Central Railroad Co.*, 375 U.S. 253. In addition, there appears to be a conflict of opinion between the decision of the First Circuit in the present case and the decision of the Fifth Circuit in the case of *A. H. Bull Steamship Co., Inc.*, v. *Ligon*, 285 F. 2d 936 (5 Cir. 1960).

Respondent Kawasaki Kisen, K.K., on cross-examination propounded this question to petitioner:

"Q. During this period you were receiving from a source which for the moment I won't reveal $70 a week, weren't you?"

Petitioner duly objected, but the District Court overruled the objection and the jury heard the plaintiff testify he received $70 a week for a period and later $52 a week. Respondent, in employing the phraseology "from a source which for the moment I won't reveal," sought to avoid the impact of this Court's ruling on the same issue in the *Eichel* case. Respondent did not spell out that petitioner received these benefits from the Federal Act applicable to longshoremen, namely the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* No reason for the offering of this testimony was given by the respondent.

The *Eichel* case, *supra,* is squarely in point. In *Eichel,* the defendant offered evidence that the plaintiff received $190 monthly benefit under the Railroad Retirement Act. The evidence was offered for the purpose of showing that the plaintiff had an inducement to prolong his disability and not return to work. The Supreme Court rejected the use of this type of evidence and wrote at page 255:

"We disagree. *In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.* Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U. S. C. § 228b (a) 4, were considered as evidence of malingering by an employee asserting a claim under

> the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U. S. 34. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments." (Emphasis added.)

The First Circuit distinguishes *Eichel* from the present case on the basis that *Eichel* was an action under the Federal Employers' Liability Act while petitioner's action was not predicated on any federal statute but is simply an ordinary negligence action governed by state law. This Court has always deemed a longshoreman's action for recovery based on a ship accident as a maritime tort ruled by federal law. In *Pope & Talbot, Inc.*, v. *Hawn*, 346 U.S. 406, the harsh state common-law doctrine of contributory negligence as a complete bar was eliminated and the liberal maritime tort doctrine of comparative negligence was applied to a longshoreman's claim. And in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), the seamen's remedy to recover for unseaworthiness exclusive of their existing right to recover for negligence was extended to longshoremen.

As stated by the Fourth Circuit in *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113, 124 (1964):

> "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by

independent contractors who may be called upon to work aboard vessels."

The reasoning of the *Eichel* case that the likelihood of misuse by the jury outweighs the value of this evidence would seem to be established in the instant case. The jury certainly must have inferred that the $70 and $52 weekly benefits were paid to the plaintiff under a compensation statute. The jury did not know that all the compensation benefits had to be repaid to the insurer of Bay State Stevedoring Company as a priority lien before the plaintiff received any money from their jury award. The jury probably figured he already has collected these weekly benefits and reduced their ultimate award accordingly. The verdict of $7,827, in view of the extensive elements of damages spelled out above, would confirm this view. In any event, the *Eichel* case (*supra*) requires a finding that the District Court committed error in receiving this prejudicial evidence.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE X. GIROUX,
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Boston, Massachusetts,
Attorney for Petitioner.

NATHAN GREENBERG,
Of Counsel.

[Appendix follows.]

Appendix.

United States Court of Appeals for the First Circuit.

No. 6447.

ALBERT THOMPSON,
PLAINTIFF, APPELLANT,
v.
KAWASAKI KISEN, K.K., et al.,
APPELLEES;

No. 6457.

BAY STATE STEVEDORING COMPANY,
THIRD-PARTY DEFENDANT, APPELLANT,
v.
ALBERT THOMPSON et al.,
APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, BREITENSTEIN,*
Circuit Judge, and GIGNOUX, *District Judge*.

* By designation.

Nathan Greenberg for Albert Thompson.

Blair L. Perry, with whom *Hale and Dorr* was on brief, for Bay State Stevedoring Company.

Hiller B. Zobel, with whom *Robert J. Hallisey*, *Thomas H. Walsh*, and *Bingham, Dana & Gould* were on brief, for Kawasaki Kisen, K.K.

OPINION OF THE COURT.

July 7, 1965.

BREITENSTEIN, *Circuit Judge.* The sole issue in this negligence action is whether at the jury trial the court properly received evidence of payments to the plaintiff (appellant Thompson) from an unnamed source during a period for which he claimed disability.

Plaintiff, an injured longshoreman, sought recovery from a shipowner (appellee Kawasaki Kisen, K.K.) which in turn sought indemnity from the stevedoring company (Bay State), the plaintiff's employer. The case was begun in a Massachusetts state court and removed to federal court by the shipowner on the ground of diversity. The shipowner filed a third-party complaint against the stevedoring company. The jury found for the shipowner on the claim of unseaworthiness and for the longshoreman on the claim of negligence. The third-party complaint issues were heard by the court without a jury and the stevedoring company was ordered to indemnify the shipowner. The verdict of $7,827 was for less than the payments made to the longshoreman by his employer's compensation carrier and the court upheld the carrier's lien.

The longshoreman is dissatisfied with the recovery and his appeal (No. 6447) is based on the alleged erroneous admission of the noted evidence. The stevedoring company's appeal (No. 6457) is directed to the preservation of its third-party defendant's rights with respect to the scope of any new trial which may be ordered.

The accident occurred when the longshoreman was working in the hold of the ship unloading cargo. He stumbled on a piece of dunnage while carrying a carton of nails. He claimed an injury to his back, was hospitalized, and asserts inability to work. On cross-examination of the

plaintiff, counsel for the shipowner asked the following question:

> "Q. During this period you were receiving from a source which for the moment I won't reveal $70 a week, weren't you?"[1]

An objection, which we deem appropriate to raise the issue here presented, was overruled. The answer disclosed that plaintiff had received $70 a week for an undefined period and later $52 a week, but at the time was receiving nothing.

Counsel for the longshoreman argues that the trial court erred in requiring an answer to the question on receipt of benefits during the disability period. He relies on *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U.S. 34, rehearing denied 375 U.S. 936, and *Eichel* v. *New York Cent. R.R.*, 375 U.S. 253. *Tipton* is not pertinent. There the Supreme Court held that evidence of the receipt of compensation under the Longshoreman's and Harbor Workers' Compensation Act[2] was not admissible on the issue of whether the plaintiff was an offshore drilling employee rather than a seaman because that status was to be determined on the basis of the facts of the case—not on the basis of a prior contention of the plaintiff.

Eichel was an action under the Federal Employers' Liability Act[3] and the Supreme Court held that evidence of the plaintiff's receipt of a disability pension under the

---

[1] Although the source of the payments was not identified, the plaintiff and his counsel, both before and after the question in issue, improperly (*cf. Eichel* v. *New York Cent. R.R.*, 375 U.S. 253, 255) brought to the attention of the jury the presence of insurance in connection with the care and treatment which the plaintiff had received.

[2] 33 U.S.C. § 901 et seq.

[3] 45 U.S.C. § 51.

Railroad Retirement Act of 1937 [4] was properly excluded. The Court commented that "it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act * * * were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act."

The instant case is not based on any federal statute but rather on ordinary negligence. No authority of which we are aware holds that the rules of evidence applicable to ordinary negligence cases do not apply when the plaintiff is a longshoreman and the defendant is a shipowner. Rule 43(a), F.R.Civ.P., provides that evidence shall be admitted if it is admissible under the rules of evidence applied in either the federal courts or the courts of the state in which the federal court is held [5] and that the rule which favors the reception of the evidence governs.[6] The case at bar was begun in Massachusetts and removed to federal court because of diversity. Under Massachusetts law evidence of receipt of collateral income is admissible "to affect the weight of plaintiff's previous testimony that he was disabled from working on account of the accident." [7] The trial court properly permitted the question to be answered.

In No. 6447 the judgment is affirmed. This action makes unnecessary the consideration of No. 6457 and that appeal is dismissed.

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[4] 45 U.S.C. § 228b(a)4.

[5] See *J. H. Horne & Sons Co.* v. *Bath Fibre Co.*, 1 Cir., 272 F.2d 8, 10.

[6] See 5 Moore, Federal Practice, ¶ 43.04, at 1326-1328 (2d ed.).

[7] *McElwain* v. *Capotosto*, 332 Mass. 1, 122 N.E.2d 901, 902.

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Supreme Court of the United States

October Term, 1965

No. 643

ALBERT THOMPSON,

Petitioner,

against

KAWASAKI KISEN, K. K., ET AL.,

Respondents.

MOTION FOR LEAVE TO SUBMIT A BRIEF, *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court of the United States

October Term, 1965

No.

ALBERT THOMPSON,

Petitioner,

against

KAWASAKI KISEN, K.K., *et al.*,

Respondents.

MOTION FOR LEAVE TO SUBMIT A BRIEF, *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HARVEY GOLDSTEIN, being duly sworn, deposes and says:

He is a member of the law firm of Goldstein & Sterenfeld, having an office for the practice of law at 50 Broadway, New York, New York. Deponent is admitted to practice in the Supreme Court of the United States.

This motion for leave to file a brief, *amicus curiae,* in support of the petition for writ of certiorari is submitted on behalf of the American Trial Lawyers Association, a nationwide bar association of more than twenty thousand members, trial counsel in the various fields of personal injury litigation.

The Association is aware of the decision by the United States Court of Appeals for the First Circuit in this

matter, a decision that members of the Admiralty Section of the Association deem to be erroneous and prejudicial to plaintiff longshoremen throughout the nation in view of the concept of uniformity in the maritime law. Its acceptance may well create a new demand for "forum shopping" in order to avoid the effect of various local rules and decisions.

The Court below used a local state statute in this Admiralty and Maritime matter, to permit the use of improper, prejudicial evidence contrary to the dictates of this Court in *Tipton* v. *Socony,* 375 U. S. 34 and *Eichel* v. *New York,* 375 U. S. 253. The reasoning by the Court of Appeals that because the case was first brought in the state court (transferred to the District Court due to diversity), the local rule of evidence would be applicable, although flying in the face of various decisions in the Federal Courts, *A. H. Bull* v. *Ligon,* 285 F. 2d 936 (C. A. 5th) and cases there cited, can only create a breach in the wall of superior, Federal law, uniformly applied throughout the nation.

Further—the effect of the decision by the Court below will obviously permit defense counsel to create the misunderstanding in the minds of jurors that injured plaintiffs seek "two bites from the same apple". The result of the case itself proves the point, a verdict of $7,800.00 when the compensation lien was $9,700.00. Such result seems rather incredible in view of the commonly accepted reasoning of the compensation system where the injured is certain of, but will receive, less money for the injury.

Tipton v. *Socony,* 375 U. S. 34 and *Eichel* v. *New York,* 375 U. S. 253, by this Court, have carefully spelled out the safeguards to plaintiffs in cases of this type, that "evidence of other benefits (should not be) pressed upon the jury (*Tipton,* p. 35)". Defense counsel, by simply not identify-

ing the payments as compensation, has evaded the concept of the two cases. Such an intrusion into the carefully nurtured effort of the various Courts to establish a basic uniformity in these matters has now been breached, and in such manner as to severely prejudice every plaintiff receiving compensation. As such, the American Trial Lawyers Association, whose members are deeply involved in suits of this nature, has a very basic interest in its outcome.

Petitioner's counsel has consented to this motion but respondents' counsel has refused.

Wherefore, deponent respectfully requests that the American Trial Lawyers Association be given leave to file a brief, *amicus curiae,* in support of the petition for writ of certiorari and, if the petition is granted, to file a supporting brief for argument.

HARVEY GOLDSTEIN,
Counsel for the American
Trial Lawyers Association,
50 Broadway,
New York, New York.

Sworn to before me this
day of October, 1965.

HERBERT W. STERENFELD
Notary Public, State of New York
No. 24-24-9180550
Qualified in Kings County
Commission expires March 30, 1966

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Supreme Court of the United States.

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No. 643.

ALBERT THOMPSON,
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KAWASAKI KISEN, K.K., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 643.

ALBERT THOMPSON,
Petitioner,
v.
KAWASAKI KISEN, K.K., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Suit was commenced by plaintiff longshoreman in the Massachusetts State Court and was removed to the United States District Court for the District of Massachusetts. Plaintiff sought recovery from defendant Kawasaki Kisen, K.K. (hereinafter "Kawasaki"), for personal injuries allegedly sustained while engaged in longshoring operations as an employee of Bay State Stevedoring Company (hereinafter "Bay State") on board a vessel owned by Kawasaki. After removal, Kawasaki filed a third-party complaint against Bay State, on which a final judgment has been entered granting Kawasaki indemnity from Bay State for all amounts Kawasaki is required to pay to plaintiff, and for fees and expenses incurred in defense of the suit brought by plaintiff. (Bay State appealed from this judgment, which appeal was dismissed.)

Question Presented.

In affirming a judgment for *plaintiff*, did the Court of Appeals err simply because plaintiff at trial testified over objection that he had received from an unidentified source varying weekly payments?

Argument.

The Supreme Court should refuse to grant a writ of certiorari for review of the judgment of the United States Court of Appeals for the First Circuit under Supreme Court Rule 19, for the following reasons:

(A) The court below has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by the lower court so as to call for exercise of this Court's power of supervision; and

(B) The decision of the court below conflicts neither with applicable decisions of this Court, nor with a decision of another Court of Appeals.

A. No Review Required.

Plaintiff commenced his suit against Kawasaki in a Massachusetts state court, alleging negligence and unseaworthiness. The action did not arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (a). *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). The action was removed to the federal court exclusively on the basis of the amount in controversy and the diversity of the citizenship of the parties. 28 U.S.C. § 1332.

By Massachusetts law, evidence as to compensation payments is admissible, even when such payments have been specifically identified, and, more significantly, even if the

plaintiff is a government employee receiving compensation under a federal statute. *McElwain* v. *Capotosto,* 332 Mass. 1, 3 (1954). The trial court and the Court of Appeals routinely applied Federal Rule of Civil Procedure 43 (a), which plainly indicates that in a federal court, when there are conflicting evidentiary rules, "the statute or rule which favors the reception of the evidence governs . . ." Such application of the "accepted and usual course of judicial proceedings" does not require review by this Court. Supreme Court Rule 19 (1(b)).

B. No Conflict Between Circuits.

Plaintiff urges a supposed conflict between the decision in the case at bar and the decision of the Fifth Circuit in *A. H. Bull Steamship Co., Inc.,* v. *Ligon,* 285 F. 2d 936, 938 (5th Cir. 1960). There the trial court, as a matter of discretion, excluded evidence that a plaintiff longshoreman (whose post-injury earnings were in fact only $400 per year) was receiving from a collateral source payments which would cease if his annual income exceeded $1,200. The discretion of the trial court was upheld by the Court of Appeals, based on a review of applicable Texas authority, particularly *R. E. Dumas Milner Chevrolet Co.* v. *Morphis* (Tex. Civ. App.), 337 S.W. 2d 185 (1960). The Fifth Circuit stated that "there may be cases where evidence of this kind should be admitted." *A. H. Bull Steamship Co., Inc.,* v. *Ligon,* 285 F. 2d 936, at 938. Under these circumstances there is no conflict between circuits.

Plaintiff here relies on *Eichel* v. *New York Central Railroad Co.,* 375 U.S. 253 (1963). The Court of Appeals in the instant case properly distinguished *Eichel,* a suit brought under the Federal Employers' Liability Act, 45 U.S.C. § 51. In the case at bar the District Court's jurisdiction did not depend on a federal statute, but rather rested wholly on

diversity (and the amount in controversy). The procedure the trial court followed in admitting the evidence ensures that suits on similar subjects will be decided on identical evidence, whether they be tried in the Massachusetts courts or the federal courts (either originally or on removal).

Conclusion.

Respondent Kawasaki submits that there is no compelling reason for granting the petition for writ of certiorari and urges that plaintiff's petition be denied.

Respectfully submitted,

SEYMOUR P. EDGERTON,
Attorney for Respondent KAWASAKI KISEN, K.K.

ROBERT J. HALLISEY,
HILLER B. ZOBEL,
THOMAS H. WALSH, JR.,
Of Counsel.

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RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT BAY STATE STEVEDORING COMPANY IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT BAY STATE STEVEDORING COMPANY IN OPPOSITION

Respondent, Bay State Stevedoring Company, prays that certiorari be denied in this action.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit was rendered on July 7, 1965 and is reported at 348 F. 2d 879 (1965).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1). The judgment of the United States Court of Appeals for the First Circuit which Petitioner seeks to have reviewed was entered on July 7, 1965.

Statutes and Rules Involved

Rule 43(a), Federal Rules of Civil Procedure, is relevant to the decision of this case and is set forth in the appendix annexed hereto (p. 9).

Questions Presented

Should this Court consider Petitioner's objection to the admission of evidence of payments received by the Petitioner during the period of his alleged disability which was admissible under Massachusetts law, in a diversity jurisdiction case removed from a Massachusetts court to the Federal District Court in Massachusetts?

Should this Court consider Petitioner's objection to the Defendant's further inquiry into the subject of insurance after the Petitioner and his counsel improperly injected such subject into the case?

Statement

The Petitioner seeks review of the judgment of the United States Court of Appeals for the First Circuit affirming the trial court's admission of evidence of payments received by the Petitioner from an undisclosed source during a period for which he claimed disability.

Petitioner has omitted from the Statement in his Peti-

tion the following facts which are material to the issues raised therein.

This is an action by an injured longshoreman to recover damages from a shipowner, Kawasaki Kisen, K.K., which in turn seeks indemnity from the Petitioner's employer, Bay State Stevedoring Company. The action was commenced by the Petitioner in a Massachusetts state court and was removed to the Federal District Court in Massachusetts by the Respondent Kawasaki Kisen, K.K. on the ground of diversity of the citizenship of the parties.

During the trial both the Petitioner and his counsel originally brought to the attention of the jury the presence of insurance in connection with the Petitioner's care and treatment. Thereafter, the trial court permitted counsel for the shipowner to interrogate the Petitioner on his receipt of payments from an unnamed source during the period of Petitioner's alleged disability. Petitioner stated no grounds for his objection to such interrogation and made no request for a limiting instruction to the jury.

Argument

I. It Was Not Error To Permit Interrogation Of The Petitioner On Income Received By Him From An Undisclosed Source During The Period Of His Alleged Disability.

After the Petitioner testified on direct examination to a prolonged period of disability allegedly arising from the accident in issue (R. 26-30), counsel for the shipowner asked on cross-examination whether the Petitioner had received $70 a week, and later $52 a week, from an undisclosed source during that period. The answer disclosed that the Petitioner had received $70 a week for an undefined period and later had received $52 a week. At no time

during the trial was there any direct evidence of the source of such payments.[1]

The judgment of the Court of Appeals affirming the trial court's admission of such evidence was correct and is consistent with the opinions of this Court and the other Courts of Appeals. The cause of action in question is one for ordinary negligence originally brought in the Massachusetts state court. It is not based on any federal statute. Rule 43(a), Federal Rules of Civil Procedure, provides that evidence shall be admitted in an action in a Federal District Court if it is admissible under the rules of evidence applied in the highest court of the state in which the federal court sits or the federal court, and that the rule which favors the reception of the evidence governs. In the Massachusetts courts, in which the Petitioner commenced this action, evidence of the Petitioner's receipt of collateral income is admissible "to affect the weight of plaintiff's previous testimony that he was disabled from working on account of the accident." *McElwain* v. *Capotosto,* 332 Mass. 1, 3, 122 N.E. 2d 901, 902 (1954) (evidence of receipt of workmen's compensation benefits admissible). On Petitioner's general objection, it was not error to admit such evidence if it was admissible for any purpose.

The decision of the court below is not in conflict with any of the cases relied upon by the Petitioner. In *Tipton* v. *Socony Mobil Oil Co., Inc.,* 375 U.S. 34, rehearing denied 375 U.S. 936 (1963), this Court held that evidence of compensation paid to the plaintiff under the Longshoreman's and Harborworkers' Compensation Act[2] was not admissible to prove that the plaintiff was a seaman and not an

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[1] The only basis for Petitioner's speculation that the jury "certainly must have inferred that the $70 and $52 weekly benefits were paid to the plaintiff under a compensation statute" (Petition, p. 7) could be Petitioner's own improper references to the presence of insurance in the case. See Argument II, infra, pp. 6-7.

[2] 33 U.S.C., section 901, *et seq.*

offshore drilling employee. The basis for this Court's holding in the *Tipton* case was that evidence of prior contentions of the plaintiff was not relevant to the issue of the plaintiff's status but that such status was to be determined on the facts of the case before the court.

In *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963), this Court held that direct evidence of the plaintiff's receipt of a disability pension under the Railroad Retirement Act of 1937 [3] was properly excluded. The two factors controlling this Court's opinion in the *Eichel* case are not present here. Unlike the present case, it appears that in the *Eichel* case the source of income was identified as statutory compensation. Of more significance is the fact that *Eichel* was an action under the Federal Employers' Liability Act. [4] Such cases are governed by their own rules of evidence, burden of proof, quantum of proof and related matters. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952); *New York, New Haven and Hartford R. Co.* v. *Henegan*, 272 F. 2d 153, 157-158 (1 Cir. 1959) reversed *per curiam* 364 U.S. 441.

In *A. H. Bull Steamship Co., Inc.* v. *Ligon*, 285 F. 2d 936 (5 Cir. 1960) the source of the income of which evidence was excluded was identified as Social Security and Veteran's Pension payments. In that case, upon which the Petitioner himself relies, the court relied upon state law, under which such evidence was not admissible.

The Court below correctly applied the plain language of Federal Rule 43(a) in this diversity action in which no claim was made under a federal statute and in which no reference was made to compensation or benefits paid under any federal act.

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[3] 45 U.S.C., section 228b(a)4.

[4] 45 U.S.C., section 51.

II. The Petitioner Is Estopped To Claim That He Was Prejudiced By The Testimony In Issue, Since Any Such Prejudice Was Caused By The Improper Conduct Of The Petitioner And His Counsel.

Although the Respondents refrained from making any reference to the Petitioner's receipt of compensation benefits, the Petitioner asserts that the jury must have inferred that the payments in issue were paid "under a compensation statute" and "reduced their ultimate award accordingly."[5] Any inferences that the payments received by the Petitioner during the period of his alleged disability were paid by a compensation insurance carrier were drawn directly from statements and references improperly made by the Petitioner and his counsel.

Counsel for the Petitioner told the jury in his opening statement that the Petitioner was treated for his injuries at the "Traveler's clinic." (R. 6a) On direct examination of the Petitioner, his counsel asked:

> "Did you go for treatment at the clinic, at the Traveler's clinic?" (R. 23)

There had been no prior mention of the Travelers Insurance Company or its clinic before these references were made. On cross-examination the Petitioner volunteered, unresponsively, that:

> "I seen a doctor at the Travelers Insurance." (R. 9a)

Counsel for the Petitioner continued to refer to the Travelers Insurance Company in his closing argument to the jury. (R. 13a, 14a)

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[5] Petition, page 7.

Such deliberate references to the fact that an insurance company was involved were highly improper. *Cf. Eichel* v. *New York Central R. Co.* 375 U.S. 253, 255 (1963); *Cotter* v. *McKinney,* 309 F. 2d 447, 451 (7 Cir. 1962). As in *Cotter* v. *McKinney, supra*:

> "We are not here confronted with a reference to insurance coverage made inadvertently by a witness in answering a proper question. We are faced with an argument to a jury made in a deliberate fashion by one skilled in the law, an attorney." 309 F. 2d at page 451.

The Petitioner may not now complain of an error which he himself initiated or invited. It is well established that:

> ". . . if a party interjects in a case incompetent and unrelated facts, the opposite party has the right to give his version of them if otherwise he would be prejudiced." *Twachtman* v. *Connelly,* 106 F. 2d 501, 506 (6 Cir. 1939).

The Court of Appeals did not err in permitting the Respondent shipowner to inquire of the Petitioner's receipt of payments from an undisclosed source. Such inquiry, standing alone, contained no reference to compensation benefits or insurance. Any prejudice to the Petitioner which resulted from the possible inference that the payments he received were compensation or insurance payments was created exclusively by the improper conduct of the Petitioner and his counsel. In any event the trial court did not abuse his discretion in permitting the Respondent shipowner to inquire into insurance matters after the subject was opened by the Petitioner himself.

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

Rule 43(a), Federal Rules of Civil Procedure.

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."